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NO. 83-1815

In the Supreme Court of the United States

OCTOBER TERM, 1983

FIRST MISSISSIPPI NATIONAL BANK,

PETITIONER,

v.

INTERNATIONAL MARINE TOWING, INC.,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the court of appeals is in conflict with previous decisions of the Supreme Court regarding the *stricti juris* nature of maritime liens.

2. Whether a bareboat charterer can acquire a lien on the vessel under charter.

3. Whether a lien prohibition clause which denies the charterer any right to permit "any liens whatsoever" is a waiver of liens by the charterer.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption. First Mississippi National Bank is a wholly-owned subsidiary of First Mississippi National Corporation and an affiliate of Bienville Insurance Company and Continental Leasing Corporation.

TABLE OF CONTENTS

Page

Questions Presented for Review i
List of Parties ii
Table of Contents iii
Table of Authorities iv
Reports of Opinions Below 1
Grounds for Jurisdiction in the Supreme Court 1
Statutory Provision Involved 2
Statement of the Case 2
Basis for Federal Jurisdiction in the District Court 5
Reasons for Allowance of the Writ 5
Conclusion 12
Certificate of Service 13
Appendix A—Order of Court of Appeals denying Petition for Rehearing, January 30, 1984 ..... A-1
Appendix B—Decision of Court of Appeals Reversing and Remanding, December 22, 1983 ..... A-3
Appendix C—Opinion of District Court, March 16, 1982 ..... A-18
Appendix D—Judgment of District Court, March 16, 1982 ..... A-24

TABLE OF AUTHORITIES

CASES: **PAGE**

Challenger, Inc. v. Durno,
227 F.2d 918 (5th Cir. 1955) 10
Frontera Fruit Co. v. Dowling,
91 F.2d 293 (5th Cir. 1937) 9
Guzman v. Pichirilo,
369 U.S. 698, 82 S.Ct. 1095, 14 ALR Fed.
544 (1962) 8
Klishewich v. Mediterranean Agencies, Inc.,
302 F.Supp. 712 (E.D. N.Y. 1969) 8
Petersen Towing Corp. v. Capt. Abrams, Inc.,
388 F.Supp. 1166 (E.D. N.Y. 1975) 9
The SAIGON MARU,
260 U.S. 490, 43 S.Ct. 172, 67 L.Ed. 364 (1923) 6
Sasportes v. M/V SOL DE COPACABANA,
581 F.2d 1204 (5th Cir. 1978) 9
Schilling v. A/S D/S Dannebrog,
320 F.2d 628 (2nd Cir. 1963) 8
TTT Stevedores of Texas, Inc. v. M/V JAGAT VIJETA, 509 F.Supp. 1072 (E.D. Tex. 1981), *reversed in part on other grounds*, 696 F.2d
1135 (5th Cir. 1983) 12
The YANKEE BLADE,
60 U.S. (19 How.) 82, 15 L.Ed. 554 (1857) 6

STATUTES:

28 U.S.C. §1254(1) 2
28 U.S.C. §1333 5
46 U.S.C. §972 10
46 U.S.C. §974 . . . . . 2, 11

MISCELLANEOUS:

Allen, *Liens: Liabilities Arising from Delay or Failure in Performance*, 49 Tul. L. Rev. 970
(1975) 7
G. Gilmore & C. Black, *The Law of Admiralty*,
239 (2nd ed. 1975) 7

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FIRST MISSISSIPPI NATIONAL BANK,

PETITIONER,

v.

INTERNATIONAL MARINE TOWING, INC.,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

First Mississippi National Bank, through undersigned counsel, petitions for a Writ of Certiorari to review the decree of the United States Court of Appeals for the Fifth Circuit in this case.

REPORTS OF OPINIONS BELOW

The opinion of the court of appeals (Appendix, p. A-3) is reported at 722 F.2d 126. The opinion of the district court (Appendix, p. A-18) is not reported.

GROUNDS FOR JURISDICTION IN THE SUPREME COURT

The decree sought to be reviewed is dated December

22, 1983 (Appendix, p. A-3). A petition for rehearing was filed on January 5, 1984, and denied on January 30, 1984 (Appendix, p. A-1). The certiorari jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The Maritime Lien Act, 46 U.S.C. §974, provides in relevant part:

> "Nothing in this chapter shall be construed to prevent the furnisher of repairs...or other necessaries...from waiving his right to a lien..." 46 U.S.C. §974.

STATEMENT OF THE CASE

This action originated in Jacksonville, Florida, where the M/V KING'S CHALLENGER was arrested on August 31, 1978 in connection with the foreclosure of a preferred ship mortgage by First Mississippi National Bank ("FMNB"). International Marine Towing, Inc. ("IMT") intervened in the action to assert a claim for breach of the bareboat charter under which the vessel was operating at the time it was arrested. Several other parties also intervened, and Southern Leasing Partners, Ltd. ("SLP") claimed the vessel as owner.

In December of 1978, all of the various parties to the action, except for IMT, were able to reach agreements to settle the litigation. This included payment of some small claims, bonding of deductibles on some personal injury claims, and withdrawal without prejudice of the claims of FMNB and the second mortgage holder. Each of these settlements were contingent upon the release of the vessel

from arrest, which in turn required successful conclusion of settlements on all of the other claims. Since it was not possible for the parties to agree on a settlement of the IMT claim, the court ordered the vessel released on the posting of a $50,000 bond to secure the IMT claim against the vessel *in rem*. The end result was that the only parties remaining active in the action were IMT and SLP. At that point, an order was obtained transferring the Jacksonville action to New Orleans for consolidation with a similar action brought by IMT against SLP. FMNB was not a party to this transfer.

Subsequent to the transfer of the Jacksonville action to New Orleans, the first preferred ship mortgage in favor of FMNB again went into default, and FMNB again foreclosed, in Jacksonville. After trial, the court in Jacksonville determined that the claim of FMNB constituted a valid and subsisting first preferred ship mortgage lien, and awarded judgment to FMNB to that effect. That has resulted in a sale by the United States Marshal, free and clear of liens. IMT declined to intervene in the second proceeding, or to have the ranking and validity of its claim adjudicated vis-a-vis that of FMNB and the other parties to that action.

The consolidated actions in New Orleans came up for trial on September 21, 1981. Up to that point, SLP had been vigorously defending against the claim of IMT. The only evidence taken at the trial, however, was that required for a judgment by default against third-party defendant Jay Freedman. IMT and SLP advised the court at that time that they had reached a settlement agreement. An order of dismissal was entered, and the case was closed, the order reciting that the court had been advised by counsel that the action had been settled, and dismissing the action

"without prejudice to the right, upon good cause shown within 60 days, to reopen the action if settlement is not consummated." This order was apparently entered on the belief that the parties had settled their controversy, and that no further action by the court would be necessary. No objection was made to the order, nor did the parties seek to have the order modified in any respect. At this point, the docket sheet was marked "closed case". On November 24, 1981, sixty days to the day after the entry of the dismissal order, a stipulation of findings of fact and conclusions of law was filed by IMT and SLP. This stipulation was approved by the court, apparently on the belief that the case was still open and that all interested parties had agreed to the stipulation. Such was not the case.

At the request of FMNB, a conference was held in chambers on December 1, 1981, at which the district judge concluded that the case should be reopened for consideration of the bond. Pursuant to the instructions of the district judge, FMNB filed on December 11, 1981, its motion to recall and vacate the court approval of the stipulation of findings of fact and conclusions of law filed on November 24, 1981, and to cancel and discharge the release bond dated January 10, 1979 in the amount of $50,000 posted by FMNB. In due course, the district judge issued his opinion and judgment, vacating the stipulation of fact and law of November 24, 1981 insofar as it recognized a lien on the M/V KING'S CHALLENGER in favor of IMT. The motion of IMT to alter and/or amend the judgment was denied on April 28, 1982, after which appeal was taken by IMT.

Since IMT and SLP had settled the *in personam* claims, the only parties remaining in the litigation were IMT and FMNB, in its capacity as principal on the release

bond securing the *in rem* claim. The judgment of the district court was therefore a final disposition of the case. The reversal by the court of appeals, on the other hand, remands the case to the district court for further proceedings, which would include such factual determinations as would establish whether IMT has a valid lien claim. A ruling on this petition is fundamental to the further conduct of the case, since reversal at this point would, once again, effect a final disposition of the case.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

This action involves the breach of a charter on a vessel, particularly the question of whether a lien arises for such breach, and the action accordingly falls within the admiralty and maritime jurisdiction of the courts of the United States under 28 U.S.C. §1333.

REASONS FOR ALLOWANCE OF THE WRIT

The decision of the court of appeals is in conflict with previous decisions of the Supreme Court regarding the *stricti juris* nature of maritime liens.

This case presents a conflict between two fundamental notions of admiralty law. On the one hand, it is well settled that a bareboat charterer is an owner *pro hac vice*, and as such can acquire no lien on the vessel under charter. On the other hand, it is also well settled that a charterer generally is entitled to a maritime lien on the vessel under charter for breach of the charter. The court of appeals has decided in the present case that a bareboat charterer is entitled to the same lien rights as other types of charterers.

To do this, the court of appeals ignored jurisprudence regarding the distinctions among types of charters, and went to the extreme of carving out an exception to the general rule precluding liens in favor of bareboat charterers. The court of appeals began by noting that cases on the point are "sparse" (Appendix, p. A-11), then noted (erroneously) that "persuasive authority exists for the proposition that a bareboat charterer can maintain a lien for the owner's breach" (Appendix, p. A-12), then proceeds to attempt to distinguish the cases cited by the district court as "not controlling" (Appendix, p. A-13). Such extension of lien rights by construction, in the absence of clear precedents, is contrary to the directions of the Supreme Court:

> "The maritime privilege or lien...is...stricti juris and cannot be extended by construction, analogy or inference." *The SAIGON MARU,* 260 U.S. 490, 499, 43 S.Ct. 172, 174, 67 L.Ed. 364 (1923).

See also *The YANKEE BLADE,* 60 U.S. (19 How.) 82 15 L.Ed. 554, 556 (1857). The prior decisions of the Supreme Court prohibit the extension of lien rights through the guise of an exception to a recognized rule. The decision of the court of appeals in the present case is therefore in conflict with applicable decisions of the Supreme Court, and for that reason, this petition for writ of certiorari should be granted.

II.

A bareboat charterer is an owner *pro hac vice,* and as such cannot acquire a lien on the vessel under charter.

There are far-reaching differences between bareboat

charters on the one hand and voyage and time charters on the other hand. Professors Gilmore and Black draw such a distinction:

> "The fact that the demise charter bears the same generic name as the time and voyage charters...is likely to lead one into thinking of the demise as quite similar in practical use and legal import to the other two. Nothing could be farther from the truth; a better first approximation would be to say that the demise is linked to the time and voyage charters only by an *accident of nomenclature...*" G. Gilmore & C. Black, *The Law of Admiralty* 239 (2nd ed. 1975) (emphasis added).

The quotation used by the court of appeals, (Appendix, p. A-11) is found at page 631 of the Gilmore and Black treatise, and all of the cases cited in the footnote supporting that quotation deal with other than bareboat charters. The language quoted above must be taken into consideration in reviewing the rest of the treatise. Having drawn the distinction between bareboat charters and other types of charters, the authors clearly decided that it would be redundant for them to raise the distinction each time a point was being made. That approach was expressly taken in Allen, *Liens: Liabilities Arising From Delay or Failure in Performance,* 49 Tul. L. Rev. 970 (1975), where the Mr. Allen begins by noting that bareboat charters "present a different problem", then goes on to write that the subject of liens under a bareboat charter "will not be pursued further herein". 49 Tul. L.Rev. at 971, n.6. In other words, both of these authorities note that bareboat charters are distinct, then proceed to discuss charters in general, it being understood that bareboat charters are different, and not included in the general discussion.

This distinction between types of charter has been recognized by the Supreme Court:

> "[A demise (bareboat) charter is] tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all. While *a demise may bring about a change in the respective legal obligations of the owner and demisee...*" *Guzman v. Pichirilo*, 369 U.S. 698, 700, 82 S.Ct. 1095, 1096, 14 ALR Fed. 544 (1962).

Other courts have also recognized the distinction between types of charter. For example, the United States Court of Appeals for the Second Circuit has noted that "*in contrast to a demise charter*...the landlord and tenant analogy is not entirely apt as applied to an ordinary time charter..." *Schilling v. A/S D/A Dannebrog*, 320 F.2d 628, 630 (2nd Cir. 1963) (emphasis added). Also, the United States District Court for the Eastern District of New York has noted, "This difference in concept between demise and time charters beings forth significant differences in the obligations of demise and time charterers." *Klishewich v. Mediterranean Agencies, Inc.*, 302 F.Supp. 712, 713 (E.D. N.Y. 1969).

One reason bareboat charterers are distinct is that they are regarded as owners. The Fifth Circuit itself has explained the reasoning behind this point of law:

> "Joint venturers cannot hold maritime liens because they are not 'strangers to the vessel,'... but rather occupy a position akin to that of the vessel's owner....Such a party may, of course, have an *in personam* contract claim against the

> true owner. But when the seas get rough one who looks, acts and profits like an owner cannot retreat to the relative safe harbor of a maritime lienor, who of course has a claim against the ship itself." *Sasportes v. M/V SOL DE COPACABANA*, 581 F.2d 1204, 1208-09 (5th Cir. 1978).

The bareboat charterer, or owner *pro hac vice*, is not a "stranger to the vessel", and therefore cannot rely on the credit of the vessel, but must rely on its "*in personam* contract claim" against the owner.

Despite such language in previous decisions, the court of appeals in the present case held in favor of a maritime lien for the bareboat charterer. To support this finding, the court of appeals first cited *Petersen Towing Corp. v. Capt. Abrams, Inc.*, 388 F.Supp. 1166 (E.D. N.Y. 1975), and noted that *Petersen* held that "the plaintiffs were entitled to a maritime lien for breach of the charter". (Appendix, p. A-12-13.) That is an erroneous reading of *Petersen*, which actually holds that "the plaintiffs are entitled to the position of a maritime lienor *as a repairman*". 388 F.Supp. at 1169 (emphasis added). It seems that the plaintiff in *Petersen* was not claiming a lien under the bareboat charter, but was claiming a lien under a separate agreement through which the plaintiff undertook to make repairs for the account of the owner, prior to consummation of the bareboat charter. This is not persuasive authority for the proposition that a bareboat charterer can maintain a lien for the owner's breach.

There are few reported cases dealing with lien claims arising on bareboat charters, but at least two decisions by the Fifth Circuit have addressed the subject. In *Frontera Fruit Co. v. Dowling*, 91 F.2d 293 (5th Cir. 1937), the court disregarded the "time charter" label which Frontera gave

to its contractural arrangement for the use of the vessel. The contract provided that the master and the crew should be considered the agents of Frontera, and the court therefore found that Frontera was in the position of an owner *pro hac vice*, the term often used to describe the relationship of a bareboat charterer to the vessel. The court went on to note:

> "Appellant, having the exclusive management and control of the vessel, bore the relationship of owner. While this relationship existed, appellant could not acquire any interest which would prejudice the mortgage lien retained by the seller. In these transactions it dealt with itself on the account of the ship, and *no maritime lien could be asserted in its favor*." 91 F.2d at 296 (emphasis added).

In *Challenger, Inc. v. Durno*, 227 F.2d 918 (5th Cir. 1955), a mortgagee in possession of a vessel sought to have substantial expenses recognized as part of its lien against the vessel. The expenses exceeded what was reasonably allowable under the mortgage, and the mortgagee was therefore claiming an ordinary maritime lien. The court found that the mortgagee would not have the right of one to whom management of the vessel was entrusted, under 46 U.S.C. §972, to incur liens. The final paragraph of footnote 2 to the decision is directly on point:

> "His status is comparable here to a charterer pro hac vice who *can acquire no maritime lien* in his own behalf." 227 F.2d at 921 (emphasis added).

It is therefore well settled that a bareboat charterer, such as IMT in the present case, stands in the shoes of an owner and cannot acquire a lien on the vessel under charter.

III.

The lien prohibition clause in the charter is a waiver of liens by the charterer.

Section 7.3 of the charter on the M/V KING'S CHALLENGER contains the following lien prohibition clause:

> "Neither the charterer nor the master of the vessel shall have any right, power or authority to sell, assign, or transfer, or to create, incur or *permit to be imposed* upon the vessel *any liens whatsoever* except for crews wages and salvage and inchoate operating expenses not discharged within sixty days from incurrence." (Appendix, p. A-15-16) (emphasis added).

This language is a clear and unequivocal waiver of any lien in favor of the charterer, and such a waiver is specifically permitted by the Maritime Lien Act:

> "Nothing in this chapter shall be construed to prevent the furnisher of repairs...or other necessaries...from waiving his right to a lien..." 46 U.S.C. §974.

The court of appeals took the position that the clause does not prohibit the creation of a lien in favor of the charterer for the owner's breach of the charter party, but this position overlooks the language in the clause which not only prohibits the charterer from imposing a lien, but also prohibits the charterer from permitting a lien to be imposed. In other words, the charterer is charged with the responsibility of preventing the imposition of liens on the vessel.

A third party with actual knowledge of such a lien prohibition clause in a charter will not be permitted to acquire a maritime lien on the vessel. *TTT Stevedores of Texas, Inc. v. M/V JAGAT VIJETA*, 509 F.Supp. 1072 (E.D. Tex. 1981), *reversed in part on other grounds*, 696 F.2d 1135 (5th Cir. 1983). Now, according to the decision of the court of appeals in the present case, the bareboat charterer, who is pledged to prevent the imposition of liens on the vessel, is in a better position than a third party, and all this only for the sake of maintaining a lien which should not have been extended in the first instance.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be allowed.

Respectfully submitted,

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April 27, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 1983, three copies of the foregoing Petition for Writ of Certiorari have been served by hand delivery pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, on opposing counsel as indicated below:

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Attorneys for International Marine Towing, Inc.

Accordingly, all parties required to be served have been served.

_____

W. E. NOEL

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3348

INTERNATIONAL MARINE TOWING, INC.,

Plaintiff-Appellant,

versus

SOUTHERN LEASING PARTNERS, LTD., ETC., ET AL.,

Defendants-Appellees.

FIRST MISSISSIPPI NATIONAL BANK,

Plaintiff-Appellee,

versus

INTERNATIONAL MARINE TOWING, INC.,

Intervenor-Plaintiff-Appellant,

versus

M/V KING'S CHALLENGER, her engines, tackle, apparel, ETC., *in rem*,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING
(JANUARY 30, 1984)

Before GARZA, RANDALL and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/S/ Signed
United States Circuit Judge

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3348

INTERNATIONAL MARINE TOWING, INC.,

Plaintiff-Appellant,

v.

SOUTHERN LEASING PARTNERS, LTD., ETC., ET AL.,

Defendants-Appellees.

FIRST MISSISSIPPI NATIONAL BANK,

Plaintiff-Appellee,

v.

M/V KING'S CHALLENGER, her engines, tackle, apparel, ETC., *in rem*,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(DECEMBER 22, 1983)

Before GARZA, RANDALL and GARWOOD, Circuit Judges.

RANDALL, Circuit Judge:

This appeal involves the breach of a bareboat charter party. The issue presented for our determination is whether a maritime lien arises in favor of the charterer for the owner's breach of the charter party. Appellant International Marine Towing, Inc. ("IMT") contends that the district court erred in holding that IMT could not acquire a lien on the M/V KING'S CHALLENGER for breach of a charter party as a matter of law and as a result of a "prohibiton of liens" clause in the charter party. IMT also alleges that the district court erroneously allowed appellee First Mississippi National Bank ("FMNB") to interpose an objection to a settlement entered into between IMT and Southern Leasing Partners, Ltd. ("Southern Leasing").

For the reasons stated below, we find that the district court properly allowed FMNB to object to the settlement between IMT and Southern Leasing. The district court erred, however, in holding that IMT was not entitled to a lien for damages suffered as a result of Southern Leasing's breach of the charter party. Thus, we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND.

This action originated in Jacksonville, Florida, where the tug M/V KING'S CHALLENGER was arrested in connection with the foreclosure of a preferred ship's mortgage by FMNB. The M/V KING'S CHALLENGER was owned by Southern Leasing, but, at the time of the arrest, the vessel was under a bareboat charter to IMT. Prior to the arrest, IMT had made substantial expenditures in outfitting and repairing the tug so as to make the vessel seaworthy and fit for its intended use. IMT had also engaged the M/V

KING'S CHALLENGER in a number of profitable towing operations. Once the tug was seized, IMT intervened, by way of an *in rem* proceeding against the vessel, to assert a claim for damages caused by the breach of the bareboat charter party. Several other parties also intervened, and eventually all parties to the action except IMT agreed to settle the litigation. It was decided that the vessel would not be sold but would be released for operation in order to obtain funds to pay various claims. A cash bond was posted by FMNB to secure IMT's claim, and the vessel was released. Thereafter, a corporate surety bond was substituted for the cash bond with FMNB as principal and the Federal Insurance Company as surety.

In addition to its *in rem* action filed in Florida, IMT filed an *in personam* action against Southern Leasing in New Orleans, Louisiana. The *in rem* action was then transferred to New Orleans and consolidated with the *in personam* proceeding. Meanwhile, in Jacksonville, FMNB foreclosed on its preferred ship's mortgage, alleging that Southern Leasing had breached the settlement agreement. The vessel was seized a second time and was sold to satisfy FMNB's judgment against Southern Leasing.

IMT's consolidated action was scheduled for trial, but IMT and Southern Leasing reached a settlement agreement as to IMT's suit for breach of the bareboat charter by Southern Leasing. An order of dismissal was entered and a stipulation of fact and law[1] was filed by the two parties

[1] The conclusions of law state:

CONCLUSIONS OF LAW

I.

A charter party is a maritime contract and any disputes which

and approved by the district court. FMNB made a motion to recall approval of the stipulation of fact and law, and to cancel the $50,000 release bond it had posted before IMT's

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(Footnote 1 continued)
may arise in the interpretation of such a contract falls within the United States District Court's Admiralty Jurisdiction. *Bunge Corporation v. The M/V FURNESS BRIDGE,* 390 F. Supp. 603 (E.D. La. 1974).

II.

The foreclosure of the mortgage on the M/V KING'S CHALLENGER resulted in the breach of the charter party entitling International Marine Towing, Inc. to a maritime lien for labor and materials furnished to the M/V KING'S CHALLENGER. *Florida Yacht Brokers, Inc. v. The Yahct HUCKSTER,* 249 F. Supp. 371 (S.D. Fla. 1965).

III.

Due to Southern Leasing Partners, Ltd.'s disputes with The First Mississippi National Bank which pre-existed the commencement of the charter party agreement with International Marine Towing, Inc., it failed to provide a seaworthy vessel at the inception of the bareboat charter party agreement, and as a consequence, International Marine Towing, Inc. has a valid claim for financial unseaworthiness against the M/V KING'S CHALLENGER, *in rem. Works v. Leather,* 97 U.S. 379, (1878). Since there were (sic) no unequivocal waiver of this requirement in the charter party agreement, this is a valid claim. *Jordan v. Mayro N.E. Drilling, Mud, Chemical, and Engineering Service,* 214 F.2d 410 (5th Cir. 1954).

IV.

The amount of damages sustained by International Marine Towing, Inc. is TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

V.

Accordingly, International Marine Towing, Inc. is entitled to judgment against Southern Leasing Partners, Ltd., as claimant of the M/V KING'S CHALLENGER Only, and against the M/V KING'S CHALLENGER, or any bond posted in lieu thereof, *in rem,* in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

actions were consolidated. FMNB asserted that the stipulation was erroneous as a matter of law in that it gave IMT a lien on the vessel and therefore the bond as a bareboat charterer. FMNB also maintained that such a lien was contrary to the "prohibition of liens" clause in the charter party. The district court set aside the stipulation insofar as it recognized a lien on the M/V KING'S CHALLENGER in favor of IMT. IMT appeals, contending that FMNB had no standing to intervene in the suit, and that the district court erred in holding IMT could not acquire a lien for breach of the charter party.

II. INTERVENTION OF FMNB.

The threshold question presented by this appeal is whether FMNB had standing to challenge the settlement entered into by Southern Leasing and IMT.[2] Before addressing this issue, however, it is necessary for us to consider the effect of FMNB's failure to comply with the procedure for intervention established by Federal Rules of Civil Procedure 24(c).[3] Although some courts have held that is reversible error to conduct any proceedings at the behest of parties who have failed to intervene formally pursuant to rule 24(c), *see, e.g., Spangler v. Pasadena City Board of Education,* 552 F.2d 1326 (9th Cir. 1977), other courts have been willing to ignore technical flaws in the

[2] In its brief, FMNB contends that the issue of FMNB's standing was not raised by IMT before the district court, and therefore cannot be raised on appeal. After reviewing the record we find the contrary; the issue of FMNB's standing was clearly raised in IMT's motion in opposition to cancel the bond.

[3] The original briefs of the parties did not discuss this issue; however, we found it sufficiently important to raise *sua sponte, see In re Beef Industry Antitrust Litigation,* 589 F.2d 786, 788 n.2 (5th Cir. 1979), and ask for supplemental briefing on this question by the parties.

intervention process, *see, e.g., Smartt v. Coca-Cola Bottling Corp.*, 337 F.2d 950 (6th Cir. 1964), *cert. denied*, 380 U.S. 934 (1965), or have been willing to overlook a total failure to comply with Rule 24(c). *See, e.g., SEC v. Lincoln Thrift Association*, 577 F.2d 600 (9th Cir. 1978); *Roach v. Churchman*, 457 F.2d 1101 (3th Cir. 1972).

We have been lenient in hearing the appeals of parties who have failed to fulfill the provisions of rule 24(c). *See In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979) (trial court implicitly authorized intervention of nonparties when it denied nonparties' motion to modify protective order so that party could comply with House of Representatives subpoena for documents); *United States v. United Fruit Co.*, 410 F.2d 553 (5th Cir.), *cert. denied*, 396 U.S. 820 (1969) (nonparty allowed to appeal denial of motion for permission to inspect and copy reports sealed under protective order); *Caswell v. Manhattan Fire & Marine Insurance co.*, 399 F.2d 417 (5th Cir. 1968) (nonparty allowed to appeal denial of motion to quash subpoena).

When FMNB first learned that IMT and Southern Leasing had settled their dispute, it asked that a conference be held in chambers. During this conference, the district court concluded that the case should be reopened for consideration of the bond. The court then directed FMNB to submit a brief on this issue, giving IMT ten days to respond. Record Vol. V at 1143. This could be construed as an invitation to FMNB to file its motion without first seeking formal intervention. *See In re Beef Industry Antitrust Litigation, supra*, at 789. *Compare Roach v. Churchman, supra*, at 1104 (affording relief to a participant without formally naming it as a party deemed "equivalent to authorizing" intervention). In view of our lenience in the

past and the fact that the district court's act might be considered equivalent to authorizing intervention, we will not dismiss for failure to comply with Rule 24(c). Instead, we will assume that the district court implicitly allowed FMNB to intervene.[4] We stress, however, that FMNB should have filed a formal motion for intervention pursuant to Rule 24(c), and that future litigants should not rely upon this decision as a means to circumvent the clear requirements of the rule.

We now turn to IMT's assertion that FMNB lacked standing to interpose an objection to the stipulation filed with the district court. IMT contends that FMNB is a mere surety for any *in rem* judgment rendered against Southern Leasing for IMT and, as such, had no right to intervene. In support of its position, IMT cites several cases purportedly standing for the proposition that sureties on a stipulation for the release of a vessel have no right to defend the bond and thus may not intervene. *The L.I.R.R. No. 18,* 67 F.2d 290 (2d Cir. 1933); *The Cartona,* 297 F. 827 (2d Cir. 1924); *The Lydia,* 1 F.2d 18 (2d Cir.), *cert. denied,* 266 U.S. 616 (1924); *Perriam v. Pacific Coast Co.,* 133 F. 140 (9th Cir. 1904); *The New York,* 104 F. 561 (6th Cir. 1900); *The Glide,* 72 F. 200 (4th Cir. 1896). Most of these cases, however, do not support the position that a surety cannot appear; the cases instead stand for the proposition that the claimant of a vessel may appeal alone, without the participation of its surety. *See, e.g., The L.I.R.R. No. 18, supra; The Lydia, supra; Perriam v. Pacific Coast Co., supra; The New York, supra; The Glide, supra.* Moreover, these cases would be more apposite if the Federal Insurance Company,

[4] In its supplemental brief, see note 3, *supra,* IMT raises certain objections to FMNB's intervention, such as timeliness, which were not raised in the district court below. Thus, we will not consider them on appeal.

surety of the release bond posted by FMNB, had sought to intervene. Here, FMNB has a direct interest in the outcome of IMT's suit, as it posted the bond as principal and will bear the cost of an *in rem* judgment against Southern Leasing.[5]

Therefore, we hold that FMNB had sufficient standing to intervene in the action between IMT and Southern Leasing, and that FMNB is a party to the case.

III. MARITIME LIENS ARISING FROM BREACH OF THE CHARTER PARTY.

The term "charter party," often shortened to "charter," refers to the document setting forth the terms of a contract when one person (the "charterer") takes over the use of the whole ship belonging to another (the "owner"). G. Gilmore & C. Black, *The Law of Admiralty*, § 4-1 at 193 (2d ed. 1975). There are three generally recognized types of charter parties: the first two, the "voyage charter" and the "time charter," occur when the vessel is manned and navigated by the owner. In the voyage charter the ship is engaged to carry a full cargo on a single voyage, whereas in the time charter the charterer engages the ship to carry cargo over a fixed period of time. The third charter is known as a "bareboat" or "demise charter." In this arrangement, the charterer operates the ship and is regarded as the owner of the ship *pro hac vice*.[6] *Id.*

Cases that address the charterer's right to a maritime

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[5] Neither FMNB nor IMT cited any cases either granting or denying the principal on a release bond the right to defend the bond (replacing the vessel) in pending litigation. The lack of authority on this issue is not surprising—usually the claimant of a seized vessel is also the principal on the bond.

[6] "For this turn; for this one particular occasion." *Black's Law Dictionary* 1091 (rev. 5th ed. 1979).

lien due to the owner's breach of the bareboat charter are sparse. Professors Gilmore & Black, in listing claims which give rise to maritime liens, include:

> *Charter-parties*...[L]iens arise for breach of charter-party in either direction. The charterer has a lien on the vessel for owner's breach; the owner may have a lien on cargo...for charterer's breach (which is usually non-payment of the charter-hire).

G. Gilmore & C. Black, *supra*, § 9-20 at 631 (footnote omitted).[7]

The fact that the charter party between IMT and Southern Leasing is a bareboat charter does nothing to eliminate the essential maritime nature of the agreement, nor the legal consequences arising therefrom. Although the bareboat charterer might be characterized as the owner *pro hac vice* as to third parties, the charterer is still the charterer as to the vessel owner and is thus entitled to a maritime lien against the vessel for the owner's breach of the charter party. In *The Oceano*, 148 F. 131 (S.D.N.Y. 1906), the court allowed the time charterer to proceed *in rem* against the vessel when the owner refused to refund excess advances made by the charterer. In *Rainbow Line, Inc. v. M/V Tequilla*, 480 F.2d 1024 (1973), the ship owner prematurely withdrew the vessel from service and the charterer sought damages for breach of the time charter.

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[7] Although the cases cited as authority involve non-bareboat charters, the authors do not limit liens for breach to time and voyage charters. Discussion in other treatises on maritime liens arising from breach of bareboat charters are equally oblique. See 2 *Benedict on Admiralty*, 3-54, § 43 (1981). The dearth of authority on this issue is noted by Hervey Allen in *Liens: Liabilities Arising from Delay or Failure in Performance*, 49 Tul. L. Rev. 970 (1975), where he observes "there is a dearth of case law on liens under a demise charter." At 971 n.6.

The court held that the charterer had a maritime lien against the vessel for the breach of the charter, noting:

> The American law is clear that there is a maritime lien for the breach of a charter party, and because the damages sought to be recovered by [the charterer] are all of a maritime nature and flow directly from the breach of the charter, it has a maritime lien.
>
> The Supreme Court, in dicta, in *The Schooner Freeman v. Buckingham,* 59 U.S. 182, 190, 15 L.Ed. 341 (1955), stated that "charter parties, must, in the invariable regular course of...business, be made, for the performance of which the law confers a lien on the vessel."

480 F.2d at 1027 (footnotes omitted).[8]

Although *Rainbow* involved the breach of a time charter, we find the court's language applicable to bareboat charters as well: "Because the damages sought to be recovered by [the charterer]...flow directly from the breach of the charter, it has a maritime lien." *Id.*

Persuasive authority exists for the proposition that a bareboat charterer can maintain a lien for the owner's breach, although these cases do not directly address this issue. In *Petersen Towing Corp. v. Capt. Abrams, Inc.,*

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[8] We note, as did the court in *Rainbow,* that there is no lien for breach if the charter party is an executory contract. *Id.* at 1027 n.6. In the present case, the vessel had been delivered before its seizure to IMT and IMT had used the boat for a number of towing operations. Delivery of the vessel commences the performance of a time charter and removes it from executory status. *Id.* Delivery of the vessel to the charterer and its use by the same also commences the performance of a bareboat charterer as so to remove its executory status.

388 F. Supp. 1166 (1975), the plaintiffs claimed to be maritime lienors when the owner breached a bareboat charter by prematurely removing the tug from service. The owner maintained that the charter party had never been executed, and that a maritime lien could not attach to this contract. The court, citing *Rainbow Lines, Inc. v. M/V Tequilla, supra,* held that the vessel had been delivered to the charterer, and that the charter party was not executory. Thus, the court held that the plaintiffs were entitled to a maritime lien for breach of the charter.

Similarly, in *Florida Yacht Brokers, Inc. v. Yacht Huckster,* 249 F. Supp. 371 (S.D. Fla. 1965), plaintiffs entered into a bareboat charter with the owner of a yacht. After execution of the charter, it was breached by the owner. The court held that the plaintiffs had a lien on the vessel for damages arising from the cancelled contract, as well as for the cost of work and materials furnished the vessel.

In the case before us, the district court concluded that four cases from this circuit prevent IMT from acquiring a lien for Southern Leasing's breach of the charter party: *Frontera Fruit Co. v. Dowling,* 91 F.2d 293 (5th Cir. 1937); *Challenger, Inc. v. Durno,* 227 F.2d 918 (5th Cir. 1955); *Saspartes v. M/V Sol de. Cocacabana,* 581 F.2d 1204 (5th Cir. 1978); and *Roberts v. Echternach,* 302 F.2d 370 (5th Cir. 1970). We find that none of these cases involves the breach of a bareboat charter by the owner and thus the cases are not controlling.

In *Frontera Fruit Co. v. Dowling, supra,* the charterer was in a joint venture with the owner of the boat, and the charterer sought to place a lien on the vessel for wages advanced to the ship's crew. We held a joint

venturer cannot acquire a lien for advances since he is primarily liable for the vessel's indebtedness. Since IMT was not a joint venturer with Southern Leasing, this case is inapplicable.

Challenger v. Durno, supra, held that a mortgagee in possession of a vessel could not create a maritime lien in its favor by paying materialmen and ship repairers for work and services ordered by him and taking assignment of their rights. *Durno* involved the authority of a mortgagee to subject the vessel to liens by third parties and thus does not bear on the issue at hand. FMNB does, however, direct our attention to footnote 2 of the *Durno* opinion, which states that the mortgagee's status as one in control of the vessel "is comparable to a charterer pro hac vice who can acquire no maritime lien in his own behalf." 227 F.2d 921 n.2 (citations omitted). However, this dictum referred to the charterer's right to acquire liens in its own behalf for advances to third parties, and none of the cases cited as authority for this dictum hold that a bareboat charter cannot hold a lien for breach of the charter party.[9]

Sasportes v. M/V Sol De Copacababa, supra, restates the rule that an owner, part owner, or joint venturer cannot hold a maritime lien. 581 F.2d at 1207. No joint venture was found in *Sasportes* and the plaintiff was allowed a maritime lien.

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[9] We also note that in the first two cases cited, *Frontera Fruit Co. v. Dowling,* 91 F.2d 293 (5th Cir. 1937), and *Odysseus III,* 77 F. Supp. 297 (S.D. Fla. 1948), the owners *pro hac vice* had an interest in the vessel greater than that of a bareboat charterer. *Frontera Fruit,* distinguished *supra,* involved a joint venturer, and *Odysseus III* involved a part-owner seeking a lien against the vessel for advances. The other case cited, *The Fort Gaines,* 24 F.2d 438 (D. Md. 1928), did not involve an owner who was *pro hac vice.* Thus, none of these cases deal with the breach of a bareboat charter party by the owner.

Finally, in *Roberts v. Echternach*, 302 F.2d 370 (5th Cir. 1962), we held that third parties can acquire a lien for work done on a vessel at the owner's express request, despite the fact that the charter party contains a "prohibition of liens" clause. However, *Roberts* does not focus on maritime liens for claims brought on behalf of a bareboat charterer as a result of the owner's breach.[10]

In sum, we find none of these cases relied upon by the district court to be applicable to the case at hand, nor do they controvert the previously discussed authority giving rise to liens for breaches of bareboat charters. Therefore, we hold that IMT is not prevented from having a maritime lien on the M/V KING'S CHALLENGER as a matter of law.

The district court also found that the "prohibition of liens" clause contained in the charter party bars IMT's lien for Southern Leasing's breach of the charter. Section 7.3 of the charter party between IMT and Southern Leasing provides:

> Neither the Charterer nor the Master of the Vessel shall have the right, power or authority to sell, assign, or transfer, or to create, incur or permit to be imposed upon the vessel any liens whatsoever except the crews' wages and salvage and inchoate operating expenses not discharged within sixty days from incurrance....The Charterer agrees to notify any person furnishing repairs,

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[10] In dicta, *Roberts* marked that, as a general proposition, a bareboat charterer does not have authority to acquire a lien in his own behalf. The two cases cited for this proposition, however, do not hold that a bareboat charter, *as such*, cannot have such a lien. *Rubin Iron Works*, 100 F.2d 871 (5th Cir. 1938), denied a maritime lien for wages to the agent of a purchaser of a vessel. *Challenger v. Durno*, 227 F.2d 918 (5th Cir. 1955), has already been distinguished, *supra*.

> supplies, towage or other necessities to the Vessel that neither the Charterer nor the Master has any right to create, incur or permit to be imposed upon the Vessel any liens whatsoever except crews' wages and salvage as set forth hereinabove.

This clause does not undertake to deal with the power of the owner to subject his vessel to maritime liens through his breach of the charter. "That clause, and the two sections of the Maritime Lien Act upon which it operates, has to do with the power of others—master, agent, charterer, etc.—to subject the vessel to liens for work done by third parties at the request of those presuming to speak for the ship." *Roberts v. Echternach,* 302 F.2d 370, 372-73 (5th Cir. 1962) (footnote omitted). In fact, as Judge Brown noted with regard to the clause, "the circumstances in which the owner could restrict his own power [to subject the vessel to liens] are severely limited and one could safely say, never to permit the owner, as such, to obtain any advantage." *Id.* at 372.

We conclude that the clause does not speak to the issue of liens created by the owner's breach and does nothing to waive charterer's lien rights for damages caused by such a breach, especially considering our strong presumption against such a waiver. *See Inland Credit Corp. v. M/T Bow Egret,* 555 F.2d 1148, 1152, n. 4 (5th Cir. 1977). By its very terms, the clause deals only with the right of the charterer to create liens in favor of third parties, and does not bar the creation of liens in favor of IMT as a result of a breach of the charter party by Southern Leasing.

IV. CONCLUSION

In its brief, IMT requests that the judgment of the district court be reversed and that the case be remanded for

judgmment pursuant to the stipulation of fact and law entered into by IMT and Southern Leasing. Brief of IMT at 20. Because the district court erred in holding that IMT could not acquire a lien for breach of a bareboat charter party, we reverse. However, we decline to order that the portion of the judgment vacated by the district court be reinstated, preferring to leave the course of this litigation in the first instance to the district court.

REVERSED and REMANDED.

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 78-3728
SECTION "J"

INTERNATIONAL MARINE TOWING, INC.

VERSUS

SOUTHERN LEASING PARTNERS, LTD., ET AL

CONSOLIDATED WITH

CIVIL ACTION
NO. 80-318
SECTION "J"

FIRST MISSISSIPPI NATIONAL BANK

VERSUS

M/V KING'S CHALLENGER

OPINION

On August 31, 1978, the M/V KING'S CHALLENGER, owned by Southern Leasing Partners, Ltd. (SLP), was seized in Florida in connection with the foreclosure of a first preferred ship's mortgage by First Mississippi Nation Bank (FMNB). At the time of the seizure, the KING'S CHALLENGER was under bareboat charter to International Marine Towing, Inc. (IMT), said charter having been entered into on July 11, 1978. IMT therefore intervened in the FMNB seizure action and asserted a claim against SLP.

In December of 1978, all parties to the action except IMT agreed to settle the litigation, and it was decided that the vessel would not be sold but would be released for operation with all proceeds of its operation used to pay various claims. Since IMT's claim was not settled, however, it was necessary that bond be set and posted by FMNB to secure IMT's claim and thus obtain release of the vessel. Bond was set at $50,000.00.

In addition to its *in rem* action filed in Florida, IMT filed an *in personam* action in the Eastern District of Louisiana, action no. 78-3728, which was assigned to this Court. On October 10, 1979, a motion to transfer the Florida action to this district was filed and on October 12, 1979, FMNB filed a second suit in the Florida Court again seeking foreclosure of its first preferred ship's mortgage. The vessel was seized a second time and IMT did not intervene in this second seizure action by FMNB. On January 22, 1980, the Florida case was transferred in its entirety to the Eastern District of Louisiana (no. 81-318) and consolidated with the *in personam* action in this Court pursuant to the October 10, 1979, motion to transfer.

This consolidated action was scheduled for trial on September 21, 1981, but IMT and SLP advised the Court that they reached a settlement agreement concerning IMT's suit for breach of the bareboat charter by SLP. A sixty-day order of dismissal was entered on September 25, 1981, and on November 24, 1981, a stipulation of fact and law[1] was

[1] The Conclusions of Law state:

CONCLUSIONS OF LAW

I.

A charter party is a maritime contract and any disputes which

filed by IMT and SLP and approved by this Court. FMNB now brings a motion to recall approval of the stipulation of fact and law and to cancel the $50,000.00 release bond it

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(Footnote 1 continued)
may arise in the interpretation of such a contract falls within the United States District Court's Admiralty Jurisdiction. *Bunge Corporation v. The M/V FURNESS BRIDGE,* 390 F. Supp. 603 (E.D. La. 1974).

II.

The foreclosure of the mortgage on the M/V KING'S CHALLENGER resulted in the breach of the charter party entitling International Marine Towing, Inc. to a maritime lien for labor and materials furnished to the M/V KING'S CHALLENGER. *Florida Yacht Brokers, Inc. v. The Yahct HUCKSTER,* 249 F. Supp. 371 (S.D. Fla. 1965).

III.

Due to Southern Leasing Partners, Ltd.'s disputes with The First Mississippi National Bank which pre-existed the commencement of the charter party agreement with International Marine Towing, Inc., it failed to provide a seaworthy vessel at the inception of the bareboat charter party agreement. and as a consequence, International Marine Towing, Inc. has a valid claim for financial unseaworthiness against the M/V KING'S CHALLENGER, *in rem. Works v. Leather,* 97 U.S. 379, (1878). Since there were (sic) no unequivocal waiver of this requirement in the charter party agreement, this is a valid claim. *Jordan v. Mayro N.E. Drilling, Mud, Chemical, and Engineering Service,* 214 F.2d 410 (5th Cir. 1954).

IV.

The amount of damages sustained by International Marine Towing, Inc. is TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

V.

Accordingly, International Marine Towing, Inc. is entitled to judgment against Southern Leasing Partners, Ltd., as claimant of the M/V KING'S CHALLENGER Only, and against the M/V KING'S CHALLENGER, or any bond posted in lieu thereof, *in rem,* in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

posted before these actions were consolidated. FMNB asserts that the stipulation is erroneous as a matter of law in that it gives IMT a lien on the vessel and therefore the bond, and IMT cannot acquire such lien as a bareboat charterer. FMNB also asserts that such a lien is contrary to the terms of the bareboat charter party. We agree.

A bareboat or demise charter, by its terms, is an agreement which transfers the full possession and control of the vessel to the charterer for a period of time. Gilmore and Black, *The Law of Admiralty, 2nd Ed.*, §4-24; *Klishewich v. Mediterranean Agencies, Inc.*, 302 F. Supp. 712 (E.D.N.Y. 1969). Therefore, for all practical purposes, the charterer stands in the shoes of the owner while the vessel is under charter and the charterer cannot acquire a lien on the vessel in his own behalf. *Roberts v. Echternach*, 302 F.2d 370 (5th Cir., 1962); *Sasportes v. M/V Sol De Copacabana*, 581 F.2d 1204 (5th Cir., 1977) (holding that an owner, part owner or joint venturer who occupies a position akin to that of owner, cannot acquire a maritime lien on the vessel in his own behalf); *See: Challenger, Inc. v. Durno*, 227 F.2d 918 (5th Cir., 1955). The Fifth Circuit, in *Frontera Fruit Co. v. Dowling*, 91 F.2d 293 (5th Cir., 1937), found plaintiff to be in position of "owner" of the vessel and thus stated:

> Appellant, having the exclusive management and control of the vessel, bore the relationship of owner. While this relationship existed, appellant could not acquire any interest which would prejudice the mortgage lien retained by the seller. In these transactions it dealt with itself on the account of the ship, and no maritime lien could be asserted in its favor.

Though the contract of letting in *Frontera* was not

specifically termed a "demise", the Court stated that "no technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command, and control..." Section 7 of the charter party provides, in part, that "Charterer shall have exclusive possession and control of the vessel, and if the vessel shall be manned, shall man and victual the vessel, at its own expense or by its procurement throughout the Charter period."

Since it stood in the place of owner while the vessel was under charter, IMT could not acquire a maritime lien in its own behalf. Further, IMT could not acquire such a lien by the express terms of the charter itself. Section 7.3 of the bareboat charter party provides:

> Neither the charterer nor the Master of the Vessel shall have the right, power or authority to sell, assign, or transfer, or to create, incur or permit to be imposed upon the vessel any liens whatsoever except for crews' wages and salvage and inchoate operating expenses not discharged within sixty days from incurrance.

It is well recognized that most demise or bareboat charters provide that neither the master nor the charterer shall have the power to create liens on the vessel, the purpose and effect of such a provision being to prevent the arising of liens for repairs, supplies, and the like provided actual or constructive notice of the provision is given to persons dealing with the ship. Gilmore and Black, *supra*. IMT obviously had notice of the no-lien provision as it was the charterer in the agreement. Thus, since IMT stood in the position of owner as bareboat charterer, and since the bareboat charter specifically provides that the charterer

shall not have the power to create liens, the stipulation of November 24, 1981, is set aside only insofar as it recognizes a lien on the vessel, and therefore the bond posted by FMNB.

New Orleans, Louisiana, this the 16th day of March, 1982.

/S/ Signed

UNITED STATES DISTRICT JUDGE

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 78-3728
SECTION "J"

INTERNATIONAL MARINE TOWING, INC.

VERSUS

SOUTHERN LEASING PARTNERS, LTD., ET AL

CONSOLIDATED WITH

CIVIL ACTION
NO. 80-318
SECTION "J"

FIRST MISSISSIPPI NATIONAL BANK

VERSUS

M/V KING'S CHALLENGER

JUDGMENT

For the foregoing reasons, it is ordered that the stipulation of fact and law of November 24, 1981, is hereby VACATED only insofar as it recognizes a lien on the M/V KING'S CHALLENGER in favor of International Marine Towing, Inc.

New Orleans, Louisiana, this the 16th day of March, 1982.

/S/ Signed
UNITED STATES DISTRICT JUDGE

NO. 83-1815

Office - Supreme Court, U.S.
FILED
MAY 29 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

FIRST MISSISSIPPI NATIONAL BANK,

PETITIONER,

v.

INTERNATIONAL MARINE TOWING, INC.,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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24 pp

TABLE OF CONTENTS

PAGE

Table of Contents i
Table of Authorities ii
Statement of the Case 1
Reasons for Denial of the Writ 4
Conclusion 12
Certificate of Service 13
Appendix A—Findings of Fact and
Conclusions of Law A-1

TABLE OF AUTHORITIES

CASES **PAGE**

Caribbean Maritime Finance Co., Ltd. v. Marina Mercante Nicaraguense, 470 F.2d 277 (5th Cir. 1972) 11

Challenger, Inc. v. Dunro, 227 F.2d 918 (5th Cir. 1955) 9

Flota Maritime Browning de Cuba, SA v. Snobl, 363 F.2d 733 (4th Cir. 1966), *cert. denied,* 385 U.S. 837 (1966) 7

Frontera Fruit Co. v. Dowling, 91 F.2d 293 (5th Cir. 1937) 9

Inland Credit Corp. v. M/T BOW EGRET, 552 F.2d 1148, 1152, n.4 (5th Cir. 1977) 11

Jack Nielson, Inc. v. Tug PEGGY, 428 F.2d 54 (5th Cir. 1970), *cert. denied,* 401 U.S. 955 (1971) 7

OCEANO, 148 F. 131 (S.D. N.Y. 1906) 5

Peterson Towing Corp. v. Captain Abrams, Inc., 388 F.Supp. 1166 (E.D. N.Y. 1975) 6

Rainbow Line, Inc. v. The M/V TEQUILA, 480 F.2d 1024 (2nd Cir. 1973) 5, 6

Roberts v. Echternach, 302 F.2d 370 (5th Cir. 1962) 11

Sasportes v. M/V SOL de. COPACABANA, 581 F.2d 1204 (5th Cir. 1978) 9

Schilling v. A/S D/A Dannebrog, 320 F.2d 628 (2nd Cir. 1963) 11

The Schooner FREEMAN v. Buckingham, 59 U.S. 182 (1855) 6

MISCELLANEOUS:

Allen, Liens: *Liabilities Arising from Delay or Failure in Performance,* 49 Tul. L. Rev. 970 (1975) 8

Benedict on Admiralty, (7th Ed. 1981) 8

IN THE
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FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

International Marine Towing, Inc., through undersigned counsel, opposes First Mississippi National Bank's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

At all times pertinent, the M/V KING'S CHALLENGER was owned by Southern Leasing Partners, a California limited partnership ("SLP") and was under bareboat charter to International Marine Towing,

Inc., a California corporation ("IMT"), pursuant to a Bareboat Charter Party dated July 11, 1978. Under the terms of the agreement, SLP warranted that it would maintain the M/V KING'S CHALLENGER free of all claims, demands and liens of its creditors, and would not, through its acts or omissions, cause the said vessel to become attached, seized, or otherwise withdrawn, or withheld from the custody, possession or control of IMT.

Following delivery of the vessel, IMT made substantial expenditures in outfitting and repairing the KING'S CHALLENGER so as to make the vessel seaworthy and fit for its intended use. These expenditures totaled over $145,000.00. Following this initial founding period, IMT engaged the KING'S CHALLENGER in a number of profitable towing operations and pursuant to the Charter Party, paid SLP $39,766.00 in charter hire.

Prior to entering the Bareboat Charter Party, SLP granted a preferred ship mortgage on the M/V KING'S CHALLENGER in favor of First Mississippi National Bank ("FMNB"). In August of 1978, just prior to an anticipated towing job which IMT had in the Caribbean, SLP did not make the requisite monthly payment on its note to FMNB because of an underlying dispute with the Bank.

The decision of the Court of Appeals from which FMNB seeks a writ of certiorari was rendered in consolidated cases.

In the first case, FMNB seized the M/V KING'S CHALLENGER in Jacksonville, Florida as a result of an apparent breach of the Preferred Ship Mortgage by SLP. While the vessel was under seizure, IMT intervened to assert a claim for a maritime lien and for breach of the

charter party by SLP, both of which arose as a result of the seizure of the vessel. Subsequently, a settlement agreement was reached in Jacksonville between SLP and FMNB which did not include the claim of IMT. With respect to IMT's claim, District Judge Melton ordered that a bond be posted in the amount of $50,000.00 as security for IMT's claim. In response to the Court's order, a cash bond for $50,000.00 was posted and the vessel was released from arrest. Thereafter, a corporate surety bond was substituted for the cash bond with FMNB as principal and Federal Insurance Company as surety. As soon as the corporate surety bond was posted, FMNB dismissed its complaint, the only remaining parties to the suit being SLP, the claimant of the vessel and the defendant, and IMT as intervening plaintiff.

While the suit in Jacksonville was pending, IMT sued SLP, *in personam*, in New Orleans seeking recovery of damages in tort and in contract for the breach of the charter party. SLP answered the suit denying liability.

Thereafter, over the objection of IMT, Judge Melton transferred the Jacksonville litigation to New Orleans pursuant to a Motion to Transfer for *forum non conveniens*, and that suit was consolidated with the pending New Orleans litigation for trial.

After extensive pretrial discovery, IMT and SLP entered into a settlement of their disputes. The settlement was presented to the Court in the form of Stipulated Findings of Fact and Conclusions of Law (A-1) pursuant to which SLP agreed, *inter alia*, that it had breached the Bareboat Charter Party and that, as a result thereof, IMT had a valid maritime lien against the M/V KING'S CHALLENGER. The stipulated Findings of Fact and Conclusions of Law were approved by the Court on November 24, 1982.

Although FMNB had voluntarily dismissed its complaint in the Jacksonville proceeding which it knew had been transferred to New Orleans, and although aware of the New Orleans proceeding in which it was not a party, FMNB sought to overturn the effect of the settlement agreement between the parties. Over the objection of IMT that FMNB had no standing, FMNB moved the Court to cancel the Release Bond and, notwithstanding the fact that FMNB was not a party to the suit, the Court allowed it to present a memorandum on the issue of whether IMT had a valid maritime lien to which IMT responded. After considering the memoranda from FMNB and IMT, the Court held that IMT did not have a maritime lien, both as a matter of law and as a result of a "prohibition of liens" clause in the Bareboat Charter Party. Judgment was entered on the basis of the Court's opinion vacating the Stipulated Findings of Fact and Conclusions of Law only insofar as it recognized a lien on the M/V KING'S CHALLENGER in favor of IMT. The Fifth Circuit reversed, holding that IMT, as bareboat charterer of the M/V KING'S CHALLENGER, was entitled to a maritime lien on that vessel as a matter of law and that the prohibition of liens clause contained in the Charter Party did not prevent that lien from arising.

REASONS FOR DENIAL OF THE WRIT

I.

The decision of the Court of Appeals is based upon the time-honored principle of admiralty law that a charterer is entitled to a maritime lien on the chartered vessel for breach of the charter. This principle does not change by virtue of the fact that the charterer is a bareboat, rather than a time or voyage, charterer.

A Charter Party or Charter Agreement is a maritime contract, the breach of which gives rise to a maritime lien. *The OCEANO*, 148 F. 131 (S.D. N.Y. 1906). The mere fact that this Charter Party is a Demise or Bareboat Charter does nothing to eliminate the essential maritime nature of the agreement, nor the legal consequences arising therefrom. Although the Bareboat Charterer might be characterized as the owner *pro hac vice* as to *third parties*, the charterer is nevertheless still the charterer as to the vessel owner and is thus entitled to a maritime lien against the vessel for the owner's breach of the Charter Party. In *The OCEANO, supra*, the vessel's *in rem* liability to a charterer for the breach of the Charter Party by the vessel's owner was made clear. Although the Charter Party involved in that case was a voyage charter, the Court made no distinction as to charter types and held:

> As soon as the performance of a charter party is commenced, a lien exists on the vessel in favor of the shipowner or charterer, and a suit in rem may be maintained for any liability of the master or owner arising therefrom.... Damages sustained by a charterer through breach of a charter contract constitutes a lien on the vessel.
> 148 F. 131, 133.

In the present case, IMT and SLP stipulated, and the District Court approved the conclusion, that SLP had breached the Charter Agreement. Respondent contends that SLP's breach of the charter, clearly a maritime contract, gave rise to a maritime lien against the vessel that was the subject of the charter.

In *Rainbow Line, Inc. v. The M/V TEQUILA*, 480 F.2d 1024 (2nd Cir. 1973), the vessel owner chartered the vessel to the charterer for a term of six months with

options to renew for two additional periods of six months. However, during the charter term, the owner prematurely withdrew the vessel from service. The charterer sought damages for the owner's breach and an arbitration panel awarded them. The charterer thereupon sought to have the award satisfied from the proceeds of the judicial sale of the vessel, which had been seized by other lienors and creditors. One such creditor, a mortgagee, contested the charterer's claim but the District Court held that the charterer had a valid maritime lien for the breach of the Charter Party by the owner. On appeal, the Second Circuit first noted that "American law is clear that there is a maritime lien for a breach of a charter party". 480 F.2d at 1027. The Court continued, citing the Supreme Court's statement in *The Schooner FREEMAN v. Buckingham*, 59 U.S. 190 (1855) that "charter-parties, must, in the invariable regular course of ... business, be made, for the performance of which the law confers a lien on the vessel... ." The Court then reasoned:

> The Truth of this statement is borne out by the fact that in rem jurisdiction in the admiralty exists only to enforce a maritime lien ... and a breach of a charter party is cognizable as an in rem action; ... therefore, the breach of a charter gives rise to a maritime lien.

Rainbow Line, Inc. v. M/V TEQUILA, 480 F.2d at 1028. (citations omitted). It is, therefore, undeniable that a maritime lien exists for a vessel owner's breach of a Charter Party. As is obvious, the lien exists in favor of the party that is damaged by the owner's breach, in this case, IMT, respondent herein.

In *Peterson Towing Corp. v. Captain Abrams, Inc.*,

388 F.Supp. 1166 (E.D. N.Y. 1975) the court was presented with a situation virtually indistinguishable from the case at bar. In *Peterson*, plaintiff was the bareboat charterer of a tug owned by the defendant. Plaintiff seized the vessel to enforce maritime liens for breach of the Charter Party by defendant for repairs made on the tug and for cash advanced by plaintiff for repairs. Like IMT, *Peterson* expended substantial sums of money in making the chartered vessel seaworthy only to have the vessel withdrawn from service prematurely. The Court in *Peterson* had no difficulty in recognizing the plaintiff as a maritime lienor for the repair debts as well as damages arising from the breach of the charter.

In *Jack Nielson, Inc. v. Tug PEGGY*, 428 F.2d 54 (5th Cir. 1970) *cert. denied* 401 U.S. 955 (1971) the Fifth Circuit, although not addressing the question directly, gave its tacit approval to a maritime lien for breach of a Bareboat Charter. The Court affirmed the exercise of admiralty and maritime jurisdiction over a dispute over a long-term Bareboat Charter-Purchase Agreement. The Fifth Circuit held that the *in rem* and *in personam* admiralty claims were severable from the claims arising from the sale part of the agreement. Accord, *Flota Maritima Browning de Cuba, SA v. Snobl*, 363 F.2d 733 (4th Cir. 1966), *cert. denied*, 385 U.S. 837 (1966).

In its Petition for Writ of Certiorari, FMNB cites a number of cases in support of the proposition that a bareboat charterer "stands in the shoes of the owner while the vessel is under charter and the charterer cannot acquire a lien on the vessel in his own behalf." These cases are all clearly distinguishable.

Apparently, FMNB bases its proposition on the

grounds that since a vessel owner, part owner or joint venturer, cannot acquire a maritime lien, neither can a bareboat charterer due to the degree of control he exercises over the vessel during the charter term. As a general principle of law, Respondent concedes that an owner or joint venturer may not acquire a maritime lien on its own behalf because of their ownership interest in the vessel. Nevertheless, a bareboat charterer may certainly obtain a maritime lien against the vessel for the breach of the Charter Party by the owner itself. In such an instance, the bareboat charterer is not creating the lien by its own action, the lien is created solely by the breach of the Charter Party by the owner. As one commentator has noted:

> [u]nless the parties provide otherwise, the shipowner is automatically given a lien upon all cargoes owned by the charterer for any amounts due under the charter, and the charterer will have a lien on the ship for unearned freight and for damages resulting from the owner's breach of the charter contract.

Benedict on Admiralty, 3-54 §3 (1981). Similarly, it has been said that "it is blackletter marine law in the United States that, under a charter party, liens for breach of the contract may arise and run in 'either direction', in one direction against the ship, and in the other against cargo". Allen, Liens: *Liabilities Arising From Delay or Failure in Performance*, 49 Tul. L. Rev. 970, (1975). Although the author of the latter source focuses his attention on voyage and time charters, no effort is made to limit the above general principle to those charter varieties. Respondent contends that no such limitation of this elementary maritime law principle is justified.

FMNB cit , *Sasportes v. M/V SOL DE COPACABANA*, 581 F.2d 1204 (5th Cir. 1978) as authority for the proposition that a bareboat charterer cannot acquire a maritime lien for breach of a Charter Party. Respondent concedes that the *Sasportes* Court, *in dicta*, did so hold; however, the *Sasportes* Court overruled the finding of the District Court that a joint venture existed and held that the plaintiff had a valid maritime lien. The elements of a joint venture, enumerated in the *Sasportes* opinion, are certainly not applicable to this case inasmuch as there has been no allegation that IMT and SLP were engaged in a joint venture.

FMNB's reliance on *Frontera Fruit Co. v. Dowling*, 91 F.2d 293 (5th Cir. 1937) is also misplaced. The party claiming a maritime lien against the vessel, Frontera, was not a charterer; the Court found the conclusion that it was a joint venturer to be "inescapable". 91 F.2d at 295. Indeed, Frontera possessed many characteristics of a joint venture which are not present here: It shared in the profits of the venture and was responsible for its debts. Indeed, Frontera was incorporated for the particular business venture involved and helped finance the purchase of the vessel. Further, as far as Respondent can ascertain, *Frontera* has never been cited in a reported case as authority for the position that a bareboat charterer may not have a maritime lien for breach of a Charter Agreement.

In *Challenger, Inc. v. Dunro*, 227 F.2d 918 (5th Cir. 1955) cited by FMNB, the Libellant was not a charterer nor a purported charterer, but was rather a mortgagee which took possession of the vessel in a private foreclosure of its mortgage. Such a situation is not even remotely similar to the facts of this case.

Moreover, although a bareboat charterer is the owner *pro hac vice* and thus not a stranger to the daily operations of the vessel from which liens usually arise, the bareboat charterer was in this instance a stranger to the financing of the vessel and as bareboat charterer was not in a position to prevent the owner's defaulting on the preferred ship mortgage. This caused the breach of the charter and IMT is entitled to a lien as a result of this breach.

II.

The Charter Party's prohibition of liens clause does not prevent the creation of a maritime lien for breach of the charter party in favor of the bareboat charterer.

Section 7.3 of the Bareboat Charter Party between IMT and SLP provides:

> Neither the *Charterer* nor the *Master* of the vessel shall have the right, power or authority to sell, assign, or transfer, or to create, incur or permit to be imposed upon the vessel any liens whatsoever except for crews' wages and salvage and inchoate operating expenses not discharged within sixty days from incurrance.

(emphasis added)

The express language of the clause appears to bar the charterer and the master from creating a maritime lien on the vessel. In the instant case, however, it was not the charterer or the master who created the lien, but the *owner*. In the Stipulated Findings of Fact, it is clear that SLP, the vessel owner, created the lien by breaching the Charter

Party. Thus, the "prohibition of liens" clause is inapplicable on its face. This same, inescapable conclusion was reached by the Fifth Circuit in *Roberts v. Echternach*, 302 F.2d 370 (5th Cir. 1962). After analyzing a similar charter provision, Judge Brown, in writing for the panel, stated:

> "The prohibition-of-liens clause ... does not undertake to deal with the power of the *owner* himself to subject his vessel to maritime liens. Indeed, the circumstances in which the owner could restrict his own power are severely limited and one could safely say, never to permit the owner, as such, to obtain any advantage. The clause ... has to do with the power of others—the master, agent, charterer, etc. to subject the vessel to liens for work done by third parties at the request of those presuming to speak for the ship". 302 F.2d 370, 372-73 (emphasis supplied).

Obviously, the "prohibition of liens" clause extends to the creation of liens in favor of third parties, and does not bar the creation of liens as a result of a breach of the Charter Party by the owner. The clause does not even speak to the issue of liens created by the owner's breach and does nothing to waive charterer's lien rights, especially considering the very strong presumption against such a waiver. *See Inland Credit Corp. v. M/T BOW EGRET*, 552 F.2d 1148, 1152, n.4 (5th Cir. 1977). Other courts that have addressed the question have come to the same conclusion as that expressed by Judge Brown in *Roberts. Caribbean Maritime Finance Co., Ltd. v. Marina Mercante Nicarguenese*, 470 F.2d 277 (5th Cir. 1972); *Schilling v. A/S D/A Dannebrog*, 320 F.2d 628 (2nd Cir. 1963).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals was based upon well established principles of admiralty law and the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 1984, three copies of the foregoing Opposition to Petition for Writ of Certiorari have been served by hand delivery pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, on opposing counsel as indicated below:

W. E. Noel
Lemle, Kelleher, Kohlmeyer, Hunley,
Moss & Frilot
2100 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130

Accordingly, all parties required to be served have been served.

CLAYTON G. RAMSEY

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 78-3728
CONSOLIDATED WITH
NO. 80-318

INTERNATONAL MARINE TOWING, INC.

Plaintiff,

Versus

SOUTHERN LEASING PARTNERS, LTD.,

Defendant.

STIPULATION OF FINDINGS OF FACT AND CONCLUSIONS OF LAW BY PLAINTIFF INTERNATIONAL MARINE TOWING, INC. AND DEFENDANT-CLAIMANT SOUTHERN LEASING PARTNERS, INC.

FINDINGS OF FACT

I.

Plaintiff, International Marine Towing, Inc. is a corporation organized and existing under and by virtue of the laws of the State of California.

II.

Defendant, Southern Leasing Partners, Ltd. is a partnership organized and existing under and by virtue of

the laws of the State of California with principal offices in Los Angeles, California.

III.

Southern Leasing Partners, Ltd. was the true and bonafide owner of the M/V KING'S CHALLENGER at all times pertinent to this litigation.

IV.

On July 11, 1978, International Marine Towing, Inc. and Southern Leasing Partners, Ltd. entered into a bareboat charter party agreement by which Southern Leasing Partners, Ltd. chartered bareboat and International Marine Towing, Inc. hired bareboat the M/V KING'S CHALLENGER, for a term of one hundred forty-four (144) months.

V.

The bareboat charter party agreement provided that International Marine Towing, Inc. would be entitled to the exclusive use, possession and control of the M/V KING'S CHALLENGER for a period of one hundred forty-four (144) months.

VI.

At the time of delivery the M/V KING'S CHALLENGER, and for the duration of the agreed term of the charter party, Southern Leasing Partners, Ltd. warranted and promised that it would maintain the M/V KING'S CHALLENGER free of all claims, demands, and liens of their creditors, and would not, through their act or

omission, cause the said vessel to become attached, seized, or otherwise withdrawn, or withheld from the custody, possession or control of International Marine Towing, Inc.

VII.

Pursuant to the terms of the bareboat charter party, International Marine Towing, Inc. took delivery of the M/V KING'S CHALLENGER and commenced making monthly payments of charter hire thereon.

VIII.

International Marine Towing, Inc. paid charter hire to Southern Leasing Partners, Ltd. in the sum of THIRTY-NINE THOUSAND SEVEN HUNDRED SIXTY-SIX AND NO/100 ($39,766.00) DOLLARS.

IX.

International Marine Towing, Inc. after taking delivery of the vessel, founded the M/V KING'S CHALLENGER at an expense of ONE HUNDRED FORTY-FIVE THOUSAND ($145,000.00) DOLLARS for hawsers, bridles, silverware, dishes, cooking utensils, bedding (including mattresses, pillows, blankets and sheets), ropes, steel hawsers, reels of wire, spare hawsers, sets of bridels, food, tools to be used on the engine, radio direction finder, gyro compasses, engine computer control panel, two-way international radio equipment, navigational equipment and repairs to items which were not in usable condition when International Marine Towing, Inc. took possession of the M/V KING'S CHALLENGER such as the engine, generators, air conditioners, etc.

X.

After the vessel was placed in a seaworthy condition, International Marine Towing, Inc. contracted and performed a tow from New Orleans, Louisiana to Puerto Cabello, Caracas, Venezuela and earned the sum of FIFTY-SIX THOUSAND FIVE HUNDRED NINETY TWO AND 50/100 ($56,592.50).

XI.

Subsequent to its first tow, International Marine Towing, Inc. contracted and performed a tow from Maracaibo, Venezuela to San Juan, Puerto Rico tow on August 20, 1978, pursuant to which it earned the sum of FIFTEEN THOUSAND ($15,000.00) DOLLARS.

XII.

Despite the fact that plaintiff paid defendant the charter hire as scheduled for July and August of 1978, Southern Leasing Partners, Ltd. failed to make the requisite monthly payment on its note to The First Mississippi National Bank in August of 1978 because of its underlying disputes with that bank. The aforesaid note was secured by a preferred ship mortgage on the M/V KING'S CHALLENGER.

XIII.

As a result of the dispute, Southern Leasing Partners, Ltd. placed the August 1978 monthly payment in an escrow account until the disputes with the bank could be resolved. As a result of this action, The First Mississippi National Bank considered Southern Leasing Partners, Ltd.

to be in default and proceeded to foreclose on its first perferred ship mortgage.

XIV.

On August 31, 1978, a Complaint was filed in the United States District Court, Middle District of Florida, by The First Mississippi National Bank and a warrant of arrest was issued for the arrest of the M/V KING'S CHALLENGER in Jacksonville, Florida.

XV.

The M/V KING'S CHALLENGER was arrested in Jacksonville, Florida on August 31, 1978 while enroute to perform a towing contract from Hamilton, Ontario to Cartagena, Columbia for Plaintiff for which Plaintiff expected to earn ONE HUNDRED SEVENTY-FIVE THOUSAND AND NO/100 ($175,000.00) DOLLARS.

XVI.

The profit contemplated by the Plaintiff on the uncompleted tow from Hamilton, Ontario to Cartagena, Columbia would habe been in the range of FORTY to FIFTY THOUSAND ($40,000.00-$50,000.00) DOLLARS.

XVII.

The M/V KING'S CHALLENGER remained in the custody of the United States District Court in Jacksonville, Florida until December 15, 1978 when it was released to Southern Leasing Partners, Ltd.

XVIII.

By virtue of the arrest of the M/V KING'S CHALLENGER, the vessel was withdrawn from service and the bareboat charter party was prematurely terminated which constituted a breach of the charter party.

XIX.

Prior to Southern Leasing Partners, Ltd. breach of the bareboat charter party agreement, International Marine Towing, Inc. made all charter hire payments to Southern Leasing Partners, Ltd. pursuant to the charter party at the time payments became due.

XX.

As a result of the arrest of the M/V KING'S CHALLENGER, the vessel was removed from the service of International Marine Towing, Inc. Without the vessel, International Marine Towing, Inc. was not able to continue its business or operations.

XXI.

At the time of the arrest of the M/V KING'S CHALLENGER, the vessel had approximately 100,000 gallons of diesel fuel on board which was valued in the amount of $50,000.00.

CONCLUSIONS OF LAW

I.

A charter party is a maritime contract and any

disputes which may arise in the interpretation of such a contract falls within the United States District Court's Admiralty Jurisdiction. *Bunge Corporation v. The M/V FURNESS BRIDGE*, 390 F.Supp. 603 (E.D. La. 1974).

II.

The foreclosure of the mortgage on the M/V KING'S CHALLENGER resulted in the breach of the charter party entitling International Marine Towing, Inc. to a maritime lien for labor and materials furnished to the M/V KING'S CHALLENGER. *Florida Yacht Brokers, Inc. v. The Yacht HUCKSTER*, 249 F.Supp. 371 (S.D. Fla. 1965).

III.

Due to Southern Leasing Partners, Ltd.'s disputes with The Mississippi National Bank which pre-existed the commencement of the charter party agreement with International Marine Towing, Inc., it failed to provide a seaworthy vessel at the inception of the bareboat charter party agreement, and as a consequence, International Marine Towing, Inc. has a valid claim for financial unseaworthiness against the M/V KING'S CHALLENGER, *in rem. Works v. Leather*, 97 U.S. 379 (1878). Since there were no unequivocal waiver of this requirement in the charter party agreement, this is a valid claim *Jordan v. Mayro N.E. Drilling Mud, Chemical and Engineering Service*, 214 F.2nd 410 (5th Cir. 1954).

IV.

The amount of damages sustained by International Marine Towing, Inc. is TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

V.

Accordingly, International Marine Towing, Inc. is entitled to judgment against Southern Leasing Partners, Ltd., as claimant of the M/V KING'S CHALLENGER only, and against the M/V KING'S CHALLENGER, or any bond posted in lieu thereof, *in rem*, in the amount of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000.00) DOLLARS.

New Orleans, Louisiana, this _____ day of November, 1981.

UNITED STATES DISTRICT COURT

Respectfully submitted,

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